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TENG FOH

v.

LIWU REALTY SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU

LC VOHRAH J

b

[COMPANIES WINDING-UP NO. 42-125 OF 1986]

22 MARCH 1989

c

COMPANY LAW: *Winding-up - Application to wind-up respondent granted in the absence of Counsel for the respondent - Petition based on a default judgment but the civil suit from which the default judgment arose had been withdrawn when the petition came up for hearing - Whether winding-up order should have been made.*

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This was an application by the respondent to set aside an order to wind-up the respondent. The petition for the winding-up of the respondent was based on a judgment obtained against the respondent for default of appearance. The respondent as defendant in that civil suit applied to set aside the default judgment and hearing was fixed for 14 October 1987. However, before the hearing, the petitioner as plaintiff in that civil suit filed an application to withdraw the civil suit and on 16 October 1987 the Senior Assistant Registrar granted the order for such withdrawal.

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Meanwhile the petition came up for hearing on 20 June 1987 but the Court adjourned the winding-up proceedings to await the result of the application to set aside the default judgment. The petition next came up for hearing on 8 February 1988 but was adjourned to enable Counsel for the petitioner to look into the possibility of substituting supporting creditors in place of the petitioner. On 25 April 1988, the respondent was not represented either on its own behalf or by Counsel and on the application of Counsel for the petitioner, the Court granted an order in terms of the winding-up of the respondent.

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In applying to set aside this winding-up order, Counsel for the respondent argued that the petition could not stand because it was founded solely on the statement in the petition that the respondent was unable to pay its debt pursuant to the default judgment dated 25 September 1985, a statement of fact which was affirmed as true in the affidavit verifying the petition, and that when the petition came up for hearing on 25 April 1988 that statement of fact did not reflect the true position as the civil suit in which the default judgment had been obtained no longer existed having been withdrawn at the instance of the petitioner so that the petition could not be sustained as the judgment upon which the petition was founded could not subsist independently of the civil suit from which it arose.

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Held:

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[1] Although the application was in substance one for the setting aside of a winding-up order which had been made in the absence of Counsel for the respondent and consequently for the petition to be set down for further hearing, the arguments of Counsel for the respondent clearly indicated that *prima facie* the petition as it stood could not be sustained.

[2] In the circumstances the winding-up order should not have been made and should be set aside.

[Application allowed. Costs to be borne by petitioner in any event.]

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Legislation referred to:

Companies (Winding-Up) Rules 1972, r. 194

Other sources referred to:

Buckley on the Companies Acts, 4th Edn. Vol. 1, p. 549

For the respondent/applicant - Y.P. Yeo; M/s. C.C. Kok & Yeo

For the petitioner/respondent - Ong Ban Chai; M/s. Ong Ban Chai & Co.

JUDGMENT**LC Vohrah J:**

This was essentially an application on the part of the respondent for the setting aside of an order made on 25 April 1988 to wind up the respondent.

The facts in so far as they are relevant to the application were briefly as follows. The petition for the winding-up of the respondent filed on 17 November 1986 was based on a judgment that had been obtained against the respondent on 25 September 1985 for default of appearance in Civil Suit No. C4553 of 1985 in the High Court at Kuala Lumpur for the sum of RM266,150 together with interest at the rate of 8% per annum from 5 August 1985 to the date of realisation and costs of RM225. The respondent as defendant in the civil suit made an application to set aside the default judgment and the application was fixed for hearing on 14 October 1987. However before the hearing, the petitioner as plaintiff in the civil suit filed an application to withdraw the civil suit and on 16 October 1987 the Senior Assistant Registrar granted an order for such withdrawal. Meanwhile the petition had come up for hearing in the High Court at Johore Bahru on 20 June 1987 when after hearing arguments of both Counsel the Court adjourned the winding-up proceedings to await the result of the application to set aside the default judgment which had formed the basis of the petition. The petition next came up for hearing on 8 February 1988 when it was adjourned further to 25 April 1988 to enable Mr. H.K. Kee, Counsel for the petitioner, to look into the possibility of substituting supporting creditors in place of the petitioner in the face of the contention on the part of Mr. Y.P. Yeo, Counsel for the respondent, that the petition could not stand founded as it was on a judgment which did not exist as the civil suit had been withdrawn. On 25 April 1988 Mr. Ong Ban Chai appeared as Counsel for the petitioner instead of Mr. Kee but the respondent was not represented either on its own behalf or by Counsel. In the absence of any representative on behalf of the respondent the Court on the application of Mr. Ong granted an order in terms of the petition for the winding-up of the respondent. The failure of Mr. Yeo to represent as Counsel for the respondent at the last hearing of the petition, it transpired, was quite inadvertent and was due to the inability of the solicitor concerned because of his illness to instruct Counsel to attend.

At the hearing of this application to set aside the winding-up order, Mr. Yeo argued that the petition could not stand because it was founded solely on the statement in the petition that the respondent was unable to pay its debt of RM266,150 together with interest and costs pursuant to the default judgment dated 25 September 1985, a statement of fact which was affirmed as true in the affidavit verifying the petition, and that when the petition came up for hearing on 25 April 1988 that statement of fact did not reflect the true position as the civil suit in which the default judgment had been obtained no longer existed having been withdrawn at the instance of the petitioner so that the petition could not be sustained as the judgment upon which the petition was founded could not subsist independently of the civil suit from

a which it arose. The logic of this argument was too obvious, in my view, to need any authority to support it. However, Mr. Yeo drew my attention to an annotation of *In re Anglo-Bavarian Steel Ball Company* in The Weekly Notes of 20 May 1899 to support his argument. In that case at the time when the winding-up petition was presented, the creditor presenting it had obtained judgment against the company for the debt on which the petition was grounded. Before the hearing of the petition the judgment had been reversed by a Divisional Court but

b the petitioner had presented an appeal from that decision to the Court of Appeal. Counsel for the petitioner asked that the petition be stood over until after the appeal was heard or that if the petition was dismissed it be dismissed with costs. Counsel for the company asked that the petition be dismissed with costs. Cozens Hardy J said that the judgment, having been reversed, must be taken to have been wrong, and that the petition must be dismissed with costs.

c Mr. Yeo also drew my attention to *Buckley on the Companies Acts*, Fourteenth Edn., Vol. 1, at p. 549 where it is stated:

An order will not be made if a sufficient case is not stated on the petition, even if such a case is proved in evidence. The order must be made *secundum allegata et probata*.

d Although this application was in substance one for the setting aside of a winding-up order which had been made in the absence of Counsel for the respondent and consequently for the petition to be set down for further hearing, the argument of Mr. Yeo clearly indicated that *prima facie* the petition as it stood could not be sustained. As a matter of common sense and in the light of Mr. Yeo's authorities, I took the view that the winding-up order should in the circumstances not have been made and should be set aside.

e I did not think it was appropriate at that stage when hearing the application to consider either the prospective liabilities of the company or the question of amending the petition under r. 194 of the Companies (Winding-Up) Rules 1972 as the main purpose of the application was for the setting aside of the winding-up order in order that the petition proper could be set down for further hearing.

f I accordingly granted an order in terms of the application for:

- a) all proceedings consequential upon the winding-up order to be stayed;
- b) the winding-up order to be set aside and the petition set down for hearing; and
- c) the respondent upon the setting aside of the winding-up order to publish and advertise notices of such order and to serve them upon the Registrar of Companies and the official receiver.

g I ordered that the costs of this application be borne by the petitioner in any event because I did not think that Counsel for the petitioner should have asked for the petition to be proceeded with in the absence of the respondent's Counsel or representative especially as the petition had been adjourned for Mr. Kee, the previous Counsel for the petitioner, to consider the possibility of substituting creditors in place of the petitioner in the light of the

h withdrawal of the civil suit and the consequent destruction of the substratum of the petition.

Also found at [1989] 2 CLJ 275

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